

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

M.C. WHITLEY, a/k/a STEVEN MITCHELL,

Defendant-Appellant.

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UNPUBLISHED  
February 27, 2007

No. 265482  
Monroe Circuit Court  
LC No. 04-034030-FC

Before: Owens, P.J., and Neff and White, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction of second-degree murder, MCL 750.317, for which he was sentenced to forty to sixty-five years in prison. We affirm.

Defendant first argues that he was denied a fair trial when the trial court improperly admitted the testimony of several “jail-house snitches” and by the prosecutor’s improper vouching for their testimony. We disagree.

The mere fact that the witnesses were themselves incarcerated, and received promises in return for their testimony, does not render the testimony inadmissible or unreliable. It was for the jury to assess the credibility of the testimony in light of the witnesses’ circumstances. *People v Hill*, 257 Mich App 126, 141; 667 NW2d 78 (2003). Further, to the extent that the witnesses’ testimony digressed beyond defendant’s admissions regarding the instant offense, and included references to other bad acts, the testimony was harmless when assessed in the context of the admissible evidence.

Defendant claims that, during his closing argument, the prosecutor bolstered the testimony of several “jailhouse snitches.” Because defendant failed to object at trial, our review is for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). Defendant identifies pages 590 through 597 of the July 20, 2005, trial transcript. However, he identifies no specific remarks, and, after a thorough review of the prosecutor’s closing argument, we find no objectionable argument.

To the extent defendant asserts that counsel was ineffective for failing to object to the jailhouse testimony and the prosecutor’s remarks, and in failing to move for a mistrial, we conclude that either the objections would have been unfounded, or there was insufficient prejudice to warrant a new trial.

Defendant next contends that there was insufficient evidence to support his second-degree murder conviction. We disagree. When the sufficiency of the evidence is challenged, this Court reviews the evidence in a light most favorable to the prosecution to determine whether any trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Robinson*, 475 Mich 1, 5; 715 NW2d 44 (2006).

Although defendant frames this issue as a combination of great weight of the evidence and sufficiency arguments, he develops the argument in sufficiency terms, and we will analyze it as such. Second-degree murder consists of the following elements: “(1) a death, (2) caused by an act of the defendant, (3) with malice, and (4) without justification or excuse.” *People v Goecke*, 457 Mich 442, 463-464; 579 NW2d 868 (1998).

Defendant and Sharp were involved in drug sales together, Sharp owed defendant money, and Sharp told his aunt that defendant was “after him.” Bell saw defendant shoot Sharp in the chest and helped him dispose of Sharp’s body in an alley. Hensley heard a gunshot, and defendant was the only occupant of the apartment who was not visible. Defendant admitted to Probst that he had killed someone, admitted to Abraham that he had killed a man named David who had failed to give him the proceeds of some drug sales, and admitted to Spraggins and Warren that he had killed Sharp. Therefore, the evidence was sufficient to establish that defendant killed Sharp with malice and without justification or excuse.

Defendant is correct that Bell received immunity, gave inconsistent interviews to the police, and changed his statement after learning about Hensley’s statement. Similarly, Hensley admitted that she had lied to the police and was released from jail on a “PR bond” after she cooperated with the police. Abraham, Spraggins, and Warren all admitted that, in consideration for their testimony, the prosecutor had agreed to inform any prison or parole officials that they had cooperated with an investigation and testified truthfully in a murder trial. Hensley, Spraggins, and Warren all had prior convictions for crimes containing an element of dishonesty or false statement. However, absent exceptional circumstances, issues of witness credibility are for the jury. *People v Lemmon*, 456 Mich 625, 642; 576 NW2d 129 (1998). “This Court will not interfere with the role of the trier of fact of determining the weight of the evidence or the credibility of witnesses.” *Hill, supra*, 257 Mich App at 141. Therefore, viewing the evidence in a light most favorable to the prosecutor, a trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.

Defendant next claims that he was denied a fair trial when the prosecutor persisted in questioning a witness about the subject of drugs after the trial court sustained a defense objection. We disagree. While it is difficult to understand why the prosecutor returned to the subject after stating that he would move on, we conclude that defendant was not prejudiced to the point that he was denied a fair and impartial trial, especially where the trial court instructed the jury to disregard the offending statement. Therefore, reversal is not warranted. *People v Abraham*, 256 Mich App 265, 272, 276; 662 NW2d 836 (2003).

Defendant argues that the trial court violated his due process rights when it exceeded the sentencing guidelines based on facts that were not found by the jury, and that were already considered in the guidelines. We disagree. Because the offense was committed before January 1, 1999, the effective date of the statutory guidelines, the judicial sentencing guidelines apply. MCL 769.34(1); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000).

Defendant asserts that *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), provides that any fact, other than that of a prior conviction, that increases a criminal sentence beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Blakely*, *supra* at 301, applying *Apprendi v New Jersey*, 530 US 466, 490; 120 S Ct 2348; 147 L Ed 2d 435 (2000). The Michigan Supreme Court recently reaffirmed that *Blakely* does not apply to Michigan's indeterminate sentencing system. *People v Drohan*, 475 Mich 140, 163-164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004). Because the maximum sentence in Michigan is set by statute—not determined by the trial court—Michigan's sentencing guidelines create a range within which the trial court must impose a minimum sentence. The trial court's power to impose a sentence will always derive from the jury's verdict, because the "maximum-minimum" sentence will always fall within the range authorized by the jury's verdict. *People v Drohan*, 475 Mich 140, 161; 715 NW2d 778 (2006).

Defendant challenges the trial court's upward departure from the minimum guidelines range. This Court reviews a departure from the judicial sentencing guidelines for an abuse of discretion. *People v Milbourn*, 435 Mich 630, 636; 461 NW2d 1 (1990). An abuse of discretion occurs if the sentence violates the principle of proportionality. *Id.*

Using a prior record variable score of 20 and an offense variable (OV) score of 40, defendant's minimum sentence range was 120 to 300 months for his second-degree murder conviction. Michigan Sentencing Guidelines (2d ed, 1988), p 80. However, adherence to the judicial sentencing guidelines is not required. *Milbourn*, *supra* at 656-657. The trial court sentenced defendant to 40 to 65 years in prison, which constitutes a substantial upward departure. Throughout his brief, defendant asserts that the factors relied on in departing from the sentencing guidelines must be objective and verifiable. However, this requirement is a function of the legislative, not judicial, guidelines. See MCL 769.34(3); *People v Babcock*, 469 Mich 247, 257-258, 272; 666 NW2d 231 (2003). Therefore, this argument is misplaced. The principle of proportionality governs departures and requires that imposed sentences must be "proportionate to the seriousness of the circumstances surrounding the offense and the offender." *Milbourn*, *supra* at 636. Departures from the judicial guidelines "are appropriate where the guidelines do not adequately account for important factors legitimately considered at sentencing" or the recommended range is disproportionate to the seriousness of the crime. *Id.* at 657.

When a trial court imposes a sentence that is an upward departure from the judicial sentencing guidelines, it must provide its reasons on the record. *People v Castillo*, 230 Mich App 442, 447; 584 NW2d 606 (1998). In the instant case, the trial court provided five reasons in its departure evaluation. This Court's first inquiry should be whether there are circumstances that were not adequately reflected in the scoring variables because the guidelines might not include all important sentencing factors. *Milbourn*, *supra* at 659-661. The trial court relied on the fact that the crime was committed over a small amount of drug debt. There was evidence that Sharp owed defendant money from drug proceeds and that he had pleaded with someone over the telephone not to kill him over a debt, possibly \$50. Further, the evidence showed that defendant admitted to killing Sharp over an unpaid drug debt. The guidelines do not adequately account for a motive of this sort, and the recommended range was disproportionate to the seriousness of these circumstances. Further, there was evidence that defendant was friends with Sharp, who he regarded as a little brother, and they were involved in drug sales together. In

*Milbourn*, the Court noted that a prior relationship between the victim and the defendant might not be included in the sentencing factors. *Milbourn, supra* at 660-661.

The trial court relied on the fact that defendant failed to seek medical help after he shot Sharp. The evidence showed that Bell and defendant wrapped Sharp's body in a sheet and placed it upstairs in the attic and went to a bar. Hensley asserted that Sharp did not die immediately; rather, she heard him talking and saw him moving his hands after he was shot. Defendant told Hensley that he was going to get help. Similarly, defendant told Abraham that he had left Sharp "saying his last prayer," but Abraham was not sure if that meant that Sharp had been alive when defendant left him and went to a bar. The trial court also relied on the fact that defendant disposed of Sharp's body in an alley, which caused "even more anguish for the victim's family." Upon returning home after the bar closed, defendant and Bell retrieved Sharp's body and transported it to a nearby alley, where they left it. At sentencing, the prosecutor read a letter from Sharp's aunt, who explained that Sharp had been disgraced when he was left in the alley to freeze. Defendant contends that the guidelines accounted for this anguish in OV 13. Defendant received five points for OV 13, which, under the judicial sentencing guidelines, takes into account serious psychological injury to a victim or a member of a victim's family and necessitates professional treatment. Michigan Sentencing Guidelines (2d ed, 1988), p 78; *People v Elliott*, 215 Mich App 259, 261-262; 544 NW2d 748 (1996).

A trial court has "broad discretion, within limits fixed by law, to tailor a sentence to the circumstances of each case and each offender, in an effort to balance society's need for protection against its interest in rehabilitation of the offender." *People v Sabin (On Second Remand)*, 242 Mich App 656, 661; 620 NW2d 19 (2000). An upward departure may be justified by reference to factors that were considered by the variables but deemed to be inadequately weighed. *Castillo, supra* at 448. Although the trial court did not specifically state that it found that OV 13 did not adequately weigh the psychological impact to Sharp's family, it did provide that defendant's disposal of Sharp's body in an alley caused "even more anguish for the victim's family." Therefore, the trial court did not abuse its discretion in relying on this factor when it departed from the sentencing guidelines.

The trial court also relied on the fact that defendant showed no remorse for the killing. Defendant correctly asserts that a trial court may not consider evidence of a defendant's refusal to admit guilt, for example in response to an offer for a lesser sentence. *People v Spanke*, 254 Mich App 642, 649-650; 658 NW2d 504 (2003). Lack of remorse, however, is a legitimate consideration in imposing a sentence and does not appear in the judicial sentencing guidelines. *People v Houston*, 448 Mich 312, 323; 532 NW2d 508 (1995). Therefore, it was proper for the trial court to consider this factor.

Although the upward departure is substantial, defendant has failed to show that the trial court abused its discretion in departing from the guidelines, or that the resulting sentence is disproportionate. Resentencing is not warranted.

In a brief filed in propria persona, defendant raises three issues that are based on the prosecutor's charging defendant with "open murder." Because defendant raises these issues for the first time on appeal, our review is for plain error affecting substantial rights. *Carines, supra* at 762-763.

Defendant is correct that, if a felony information charges no crime, the trial court lacks jurisdiction to try the accused. *People v Hardiman*, 132 Mich App 382, 384; 347 NW2d 460 (1984). The felony information charged defendant with “HOMICIDE – OPEN MURDER – STATUTORY SHORT FORM” and alleges that defendant murdered Sharp, contrary to MCL 750.316. MCL 750.318 provides in pertinent part, “The jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, ascertain in their verdict, whether it be murder of the first or second degree.” This statute is commonly referred to as the “open murder statute.” MCL 750.318; see *People v Watkins*, 468 Mich 233; 661 NW2d 553 (2003). Therefore, open murder is an offense that exists in this state, and defendant’s argument is misplaced.

Defendant argues that he was deprived of his constitutional right to be informed of the nature and cause of the accusation against him because he never received notice of a second-degree murder charge. We disagree. “In all criminal prosecutions, the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation[.]” US Const, Am VI; Const 1963, art 1, § 20. The felony warrant and information charged defendant with open murder and cited the statute for first-degree murder, MCL 750.316. The warrant and information clearly stated that the substance of the accusation was the murder of Sharp. Second-degree murder is included in a charge of open murder. A prosecutor is permitted to file a felony information for open murder and leave the degree to be determined as the proofs develop. *People v Steubenvoll*, 62 Mich 329, 331; 28 NW 883 (1886); *People v Johnson*, 427 Mich 98, 112 n 12; 398 NW2d 219 (1986). The felony information need not specify the degree of murder, and it is sufficient if it asserts that the defendant murdered the decedent. *People v Spells*, 42 Mich App 243, 245; 201 NW2d 361 (1972); *People v Brown*, 23 Mich App 528, 534; 179 NW2d 58 (1970). MCL 750.318 and MCL 767.71 contemplate “that the circuit court has the power to adjudicate both first- and second-degree charges on a bindover on open murder.” *Johnson*, *supra* at 109. Further, there is no “fundamental constitutional interest in being charged with degree-specific murder.” *Id.* at 112. Therefore, defendant was not deprived of his right to be informed of the offense charged.

Lastly, defendant claims that he was denied the effective assistance of counsel by counsel’s failure to request a bill of particulars. The United States and Michigan Constitutions guarantee the right to effective assistance of counsel. US Const, Am VI; Const 1963, art 1, § 20; *United States v Cronin*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984); *People v Pubrat*, 451 Mich 589, 594; 548 NW2d 595 (1996). To establish ineffective assistance of counsel, a defendant must show that: 1) counsel’s performance fell below an objective standard of reasonableness under prevailing professional norms; 2) there is a reasonable probability that, but for counsel’s error, the result of the proceedings would have been different; and 3) the resultant proceedings were fundamentally unfair or unreliable. *Bell v Cone*, 535 US 685, 695; 122 S Ct 1843; 152 L Ed 2d 914 (2002); *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Under this standard, defendant must prove that there is a reasonable probability he would have been acquitted if counsel had moved for a bill of particulars.

Defendant was charged with “HOMICIDE – OPEN MURDER – STATUTORY SHORT FORM . . . did murder Francis David Sharp; contrary to MCL 750.316 . . .” MCL 767.44 permits an information to state a short form for murder, “A.B. murdered C.D.[.]” as the prosecutor did in the instant case. MCL 767.44 provides that “the prosecuting attorney, if

seasonably requested by the respondent, *shall* furnish a bill of particulars setting up specifically the nature of the offense charged.” (Emphasis added; see also *People v Missouri*, 100 Mich App 310, 330-333; 299 NW2d 346 (1980).) Pursuant to MCR 6.112(E), the trial court *may*, on motion, order the prosecutor to provide a bill of particulars. Where a court rule and statute conflict, the court rule prevails if it is a matter of practice and procedure. *People v Conat*, 238 Mich App 134, 162-163; 605 NW2d 49 (1999). Because the conflict here concerns whether the prosecutor is required to provide a bill of particulars upon request or whether the trial court has discretion, it is a matter of practice and procedure. Therefore, any request would have been discretionary.

Defendant fails to explain how a request for a bill of particulars would have resulted in his acquittal. Even if the trial court had granted such a motion, defendant has identified nothing to explain how any additional information would have affected the proceedings. There is nothing on the record to support this theory. Therefore, defendant has failed to rebut the presumption of effectiveness of counsel. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

Affirmed.

/s/ Donald S. Owens

/s/ Janet T. Neff

/s/ Helene N. White